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# Not Now So Unexacting? The Section 139 Threshold Re-Defined

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*Johnston v The Chief Constable of Merseyside Police*  
[2009] EWHC 2969 (QB)

*When considering whether to grant leave under section 139(2) of the Mental Health Act 1983, a court must not only apply the test in Winch v Jones, it must also ask whether the proposed claim has a real prospect of success.*

## Introduction

This case concerned a proposed claim for damages by a man who had been apprehended by the police, apparently under section 136 of the *Mental Health Act 1983*. With two exceptions, no claim for acts purportedly done or functions purportedly discharged under the Act may proceed without leave of the High Court.<sup>2</sup>

## The facts

On 8 January 2006, Mr Johnson, who has a history of mental health problems going back more than a decade, was at a property in Bootle, Merseyside. As a result of his behaviour, one of the occupants of that property summoned an ambulance. In accordance with usual practice, however, the police attended as well. Mr Johnson acknowledged that he had needed medical help, but he said he had not wanted the police to be called.<sup>3</sup>

On the basis of the witness statements and expert evidence, there is clearly a profound conflict between the parties as to what happened next.<sup>4</sup> It would seem to be common ground, however, that:

- (a) CS gas was sprayed at Mr Johnson, resulting in severe skin blistering and damage to the left side of his face, his left ear and his chest.
- (b) He was detained, put in handcuffs and taken to hospital. (The constable in question claimed to have been acting under section 136 of the *Mental Health Act 1983*, but Mr Johnson said no such information had been vouchsafed to him at the time.<sup>5</sup>)
- (c) Mr Johnson was not subsequently charged with any criminal offence.<sup>6</sup>

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<sup>2</sup> *Mental Health Act 1983*, section 139(2). The exceptions, which are discussed below, are set out in sub-section (4). See the penultimate paragraph of this article and footnote 26.

<sup>3</sup> See paragraph [2] of the judgement.

<sup>4</sup> See [16]-[21].

<sup>5</sup> See [26].

<sup>6</sup> See [3].

## The claim

Mr Johnson wishes to claim damages for false imprisonment and assault. He served a claim form and detailed particulars of claim on 21st October 2008, but failed also to seek leave under section 139(2) of the *Mental Health Act 1983*.<sup>7</sup> That point was taken in a defence served on 12th December 2008, and on 23rd of that month, Mr Johnson issued an application for retrospective leave to proceed. That application was discontinued subsequently, because the decision in *Seal* meant it was bound to fail,<sup>8</sup> and the present application for permission to proceed was made on 24th March 2009. This meant that Mr Johnson faced an additional problem.

The limitation period for a false imprisonment claim is six years,<sup>9</sup> so it will not expire until January 2012. It is now accepted, however, that the limitation period for a claim of assault is a mere three years.<sup>10</sup> The application for permission to proceed was therefore made two-and-a-half months out-of-time.

## The issue

Mr Johnson asked the court to waive the limitation period in this case, and also to give leave so that his claim could proceed to trial. For present purposes, the chief question was as to the test the court should apply when considering an application for leave.

## The existing test

The leading authority on section 139(2) remains *Winch v Jones*,<sup>11</sup> in which the Court of Appeal gave a claimant the leave she had been denied at first instance. The court said the judge had applied too stringent a test, and Sir John Donaldson, MR noted:

*"As I see it, the section is intended to strike a balance between the legitimate interests of the applicant to be allowed, at his own risk as to costs, to seek the adjudication of the courts upon any claim which is not frivolous, vexatious or an abuse of process, and the equally legitimate interest of the respondent to such an application not to be subjected to the undoubted exceptional risk of being harassed by baseless claims by those who have been treated under the Acts. In striking such a balance, the issue is not whether the applicant has established a prima facie case or even whether there is a serious issue to be tried, although that comes close to it. The issue is whether, on material evidence immediately available to the court, which, of course, can include material furnished by the proposed defendant, the applicant's complaint appears to be such that it deserves the fuller investigation which will be possible if the intended applicant is allowed to proceed."*<sup>12</sup>

A claimant should be given leave to proceed, therefore, if his claim deserves fuller investigation. In *Seal*, Lord Bingham said that by this test, "the threshold for obtaining leave under section 139(2) has been set at a very unexacting level [...] an applicant with an arguable case will be granted leave."<sup>13</sup> But should the court remain true to this test?

7 See [36] & [37].

8 *Seal v Chief Constable of South Wales Police* [2007] UKHL 31. See: David Hewitt, *Protection from what? The nullifying effect of section 139, Journal of Mental Health Law*, November 2007.

9 Limitation Act 1980, section 2.

10 Limitation Act 1980, section 11(4); *A v Hoare* [2008] 2 WLR 311.

11 *Winch v Jones* [1986] 1 QB 296 (Court of Appeal).

12 At page 305 (emphasis added).

13 *Seal v Chief Constable of South Wales Police*, *supra*, at [20]. In that case, the House of Lords decided, by a majority, that Mental Health Act proceedings commenced without permission were a nullity, and that leave could not, therefore, be granted retrospectively.

## Submissions

For the defendant chief constable, it was argued that, 25 years on, the *Winch v Jones* test should be modified; that it should be tightened.<sup>14</sup> This argument was based upon the Civil Procedure Rules (CPR), which, of course, came into effect subsequently. They say that summary judgment may be given where a claim (or, for that matter, a defence) has “no real prospect of success”.<sup>15</sup> It was argued that this should also be the test in section 139(2) cases, and two authorities were put forward for this proposition:

- (a) In *Menagh v Chief Constable of Merseyside*, a claim for false imprisonment and malicious prosecution was struck out after close of proceedings, because there was no direct evidence to support it and “no cogent or positive evidence” to support the inferences that would therefore have to be drawn if the claim was to succeed.<sup>16</sup>
- (b) In *Khadine v The Commissioner of Police of the Metropolis*, there was no evidence to support a claim that was based simply on a series of challenges to what was said by police witnesses.<sup>17</sup>

Furthermore, the defendant argued that civil procedure had changed since the test was first approved. In those days, on interlocutory hearings, the court simply assumed the correctness of the facts set out in the particulars of claim. In *Winch v Jones*, for example, it was said to be “no part of the judge’s duty, on an application for leave, to conduct a trial on affidavits”.

*“The purpose is to see whether the evidence before him adds up to the answer: if this allegation were tried out, there is no realistic possibility that the case might succeed. It is not, in my judgment, permissible to go further.”*<sup>18</sup>

Now, however, the court must consider all the evidence available, to see whether the claim had a real prospect of success.

## Decision

The judge, Coulson J, said that, notwithstanding the changes wrought by the CPR, “it would be wrong to modify in any significant way” the *Winch v Jones* test.<sup>19</sup> It was, after all, approved, at least in passing, in *Seal*, and furthermore:

*“It seems to me that the balance to which Sir John Donaldson referred, and the necessity for the court to focus on whether the proposed claim being put forward was frivolous, vexatious or an abuse of process, remains the correct and fair approach to applications of this kind.”*<sup>20</sup>

That said, the judge did concede that one ‘modification’ was appropriate. He noted that CPR, Part 24 “has introduced a new emphasis on allowing claims to go to trial only where they have a real prospect of success”, and said:

*“It would, I think, be absurd for a court to conclude that a claim was not frivolous, vexatious or an abuse of process, and thus grant permission under section 139(2) of the Act, in circumstances where, if the court had asked itself the CPR Part 24 question, it would have concluded that the proposed claim had no real prospect of success.”*<sup>21</sup>

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14 If submissions were made for the claimant on the section 139(2) point, they are not recorded in the judgment.

15 CPR, rule 24.2(a).

16 *Menagh v Chief Constable of Merseyside* [2003] EWHC 412 (QB).

17 *Khadine v The Commissioner of Police of the Metropolis* [2005] EWCA Civ 196.

18 *Winch v Jones*, *supra*, per Parker LJ at page 306.

19 *Johnston v The Chief Constable of Merseyside Police*, *supra*, at [12].

20 *Ibid.*

21 *Ibid.*, at [13].

On an application under section 139(2), therefore, a court must ask whether the proposed claim has a real prospect of success.

Coulson J concluded that Mr Johnson's proposed claim was not frivolous, vexatious or an abuse of process, and that it had a real prospect of success.<sup>22</sup> He therefore granted the necessary permission under section 139(2) of the *Mental Health Act 1983*, and, because he also agreed to waive the three-year limitation period,<sup>23</sup> the claim was able to proceed.

## Discussion

Section 139 leave continues to exercise the courts, and it seems that the question of the precise status of proceedings issued without it might not have been resolved to everyone's satisfaction. Recently, in proceedings concerning not the *Mental Health Act 1983*, but section 329 of the *Criminal Justice Act 2003*, the Court of Appeal distinguished *Seal*, but also, after a survey that encompassed section 17 of the *Charitable Trusts Act 1853*, section 130(2) of the *Insolvency Act 1986* and "successive" *Limitation Acts*, noted that only section 139 "has been construed as creating a mandatory requirement of prior leave".<sup>24</sup>

The detention of patients, purportedly under section 136 of the *Mental Health Act 1983*, is also a cause for concern.<sup>25</sup> It might fall to the court to determine the truth in this case, but the fact that two people can disagree about whether section 136 was ever mentioned is disappointing. Perhaps the time has come for a short, simple form to be devised for use in 'public place' detentions.

Some potential defendants will be unaffected by the decision of Coulson J. For esoteric, historical reasons, no permission has ever been required for proceedings concerning the acts or omissions of the Secretary of State or many NHS bodies under the *Mental Health Act*.<sup>26</sup> Where a claim relates to the use of section 136, however, or to the initial decision to detain a patient in hospital, this case will make a difference.

*Winch v Jones* remains good law, and the test it established has not been displaced. Now, however, that test is rather more stringent, for a potential claimant will have to show not merely that his case is arguable, but that it has a real chance of success. That is a palpable change, whose effect might well be to forestall claims that would otherwise have proceeded all the way to trial. And plainly, therefore, it is a good deal more 'significant' than the judge was prepared to allow in Mr Johnson's case.

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<sup>22</sup> See [22]-[27].

<sup>23</sup> See [33]-[43].

<sup>24</sup> *Adorian v The Commissioner of Police of the Metropolis* [2009] EWCA Civ 18, at [22]. This provision requires that leave be obtained for any assault, battery or false imprisonment claim brought by someone convicted of a criminal offence committed on the same occasion. It was introduced "to protect people from being baselessly sued by criminals for doing no more than try to arrest them or stop them offending" (per Sedley LJ at [20]). Plainly, it can

also be preyed in aid by the police. (The author is grateful to Nick Peel of Weightmans LLP for referring him to this case.)

<sup>25</sup> See: David Hewitt, "She took no reasoning": Enticing someone into a public place, *Journal of Mental Health Law*, Spring 2009, page 101.

<sup>26</sup> *Mental Health Act 1983*, section 139(4). See: David Hewitt, *Something less than ready access to the courts: Section 139 and local authorities*, *Journal of Mental Health Law*, February 2000, page 73.